Supreme Court, U.S.
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No: 02-12

In The

Supreme Court of the United States

Christopher Langdon, Petitioner,

v.

Lyndo Tippett, Roy Cooper et al.

consolidated with:

Christopher Langdon, Petititoner,

v.

J.J. Swain, Jack Murdock, F.D. Martin et al.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

REVISED REPLY BRIEF

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19 pp

QUESTIONS PRESENTED FOR REVIEW

I filed two complaints in the W.D.N.C. *Langdon v. Swain* seeks damages against three NCDOT (current or former) employees in their individual capacities. *Langdon v. Tippett and Cooper* challenges the constitutionality of several *N.C.* statutes. The defendants in *Langdon v. Swain et al.* are in default and they failed to meet any of the requirements to set aside the default. Instead of entering a default and a default judgment, the district court consolidated the cases and dismissed them *sua sponte*, without notice and opportunity to be heard, under 28 U.S.C., Section 1915(e)(2), the informa pauperis statute, despite the fact that neither case was filed under 28 U.S.C. and no other federal court has ever dismissed a fully paid, non-prisoner, non-in forma pauperis complaint via 28 U.S.C. 1915(e)(2). The Fourth Circuit of the U.S. Court of Appeals affirmed. However, the Respondents now admit to several critical errors in the district court's opinion and the Fourth Circuit's opinion. They now alleged several new defenses and arguments for the first time.

(1) May a fee-paid (in full), non-prisoner, non-informa pauperis complaint be dismissed under the informa pauperis statute, 28 U.S.C., Section 1915(e)(2) ?

(2) May a federal court dismiss state law

claims, pendent and/or diversity based, via 28 U.S.C., Section 1915(e)(2) ?

(3) Are the pleadings and papers of a pro se party required to be liberally construed ?

(4) Are suits against state employees, sued in their individual capacities, for the deprivation of property without just compensation, allowed in the federal courts, contrary to the Forth Circuit's ruling ?

(5) May a U.S. District Court dismiss a case, *sua sponte*, based on an allegation of *res judicata*, without notice and an opportunity to be heard on the alleged issue?

(6) May a U.S. Court of Appeals dismiss a case, *sua sponte*, for failure to state a claim, without notice and opportunity to be heard ?

(7) When a plaintiff makes a valid request for the entry of default under Rule 55(a), F. R. Civ. Proc., is the entry of default mandatory, or, is it discretionary ?

(8) May a default be set aside without any showing of a meritorious defense, good faith, lack of prejudice to the plaintiff, and without any affidavits ?

(9) Is a plea of *res judicata* waived if not raised at the district court level and, if properly raised, what requirements must be met to prove it ?

(10) Did the district court have jurisdiction to dismiss my claim for the deprivation of my property ?

(11) Did the district court judge erroneously deny my motion to transfer my cases and my motions to recuse ?

(12) May a Respondent raise several new alleged defenses and arguments (including qualified immunity) before the U.S. Supreme Court that weren't raised in the lower courts ? (This question has been added because the Respondents have raised, for the first time several alleged defenses in their brief)

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I. ARE PRO SE PLEADINGS AND PAPERS REQUIRED TO BE LIBERALLY CONSTRUED ?

The dictum that the papers of a pro se party are to be liberally construed is well established. *Haines v. Kerner,* 404 U.S. 519 (1972).

A *pro se* civil rights complaint's allegations should be read expansively and taken as true. *White v. Bloom,* 621 F. 2d 276 at 276 [1](8th Cir.1980). Although I asked that my papers be liberally construed, the lower courts refused to do so, which is an abuse of discretion. *Traguth v. Zuck,* 710 F. 2d 90, 95 (2nd Cir.1983)

Allowing *pro se* parties a fair hearing is important to the vast majority of Americans who cannot afford attorneys in complex litigation. Should our civil courts be accessible only to a wealthy few? My cases were erroneously dismissed, via 28 U.S.C. 1915, which the defense now admits is irrelevant, without a hearing, the essence of due process of law. The Respondents now admit in their brief (Rsp..B.) to at least 3 critical errors in the 4th Cir.'s opinion, an opinion that threatens me with sanctions. Despite the admitted errors, the Respondent's attorneys are asking for sanctions in another case [see Supplemental Brief], based on the unpublished rulings [29 F. Appendix 171], which may be cited in other proceedings, if a copy is attached.

Certiorari may be granted under Rule 10 because the opinions below are a gross departure from the usual course of judicial rulings.

II. MAY STATE OFFICIALS BE SUED IN THEIR INDIVIDUAL CAPACITIES IN FEDERAL COURT FOR A TAKING OF PROPERTY?

The respondents admit in their brief (Rsp. B., p.8]these suits are allowed. The erroneous, *sua sponte* dismissal of *Langdon v. Swain et al.* for failure to state a claim by the 4th Cir. proves that my suits were not liberally construed and not given proper consideration. I responded to the *sua sponte* ruling in my *Petition for Rehearing*, which was denied. I am not aware of any other Circuit that allows a *sua sponte* dismissal for failure to state a claim without notice and an opportunity to be heard. Therefore, I seek review of this issue under Rule 10.

III. MAY A FEDERAL COURT IGNORE RULES 12 & 55, F.R.C.P., IN REMOVING A DEFAULT ?

Swain, Martin and Murdock are in default and never filed an answer. The Respondents erroneously equate the filing of a Rule 6(b) motion with a responsive pleading/motion under Rule 12 that automatically extends the filing time.

"..all the motions [Petitioner's & Respondents'] arrived at the Clerk's office on the same day, Plaintiff cannot show that Defendants had 'failed to plead or other wise defend' before his motions for default entry were filed. Fed R. Civ.P.55(a)." R. B., pg.11

Rule 55 states: "fails to plead or otherwise

defend *as provided by these rules,"* referring to the requirements of Rule 12. *Atl. St. Sply. Co. v. Int. Mart. Sply. Co.,* 268 F. Supp. at 1009 [2] (S.D.N.Y. 1967). It is argued that the first Rule 6(b) motion was one day late for defendant Murdock and timely with regards to Swain and Martin. However, that first motion was denied by Mag. Judge Cogburn (App.I, p.1-3) and never appealed. There's no copy of it in the Resps. App. Murdock's answer was due on 7-18-01, Swain's and Martin's on 7-19-01. The amended Rule 6(b) motions were signed on 7-20-01 and erroneously allowed on 7-27-01.

The 4th Cir. ruled that the district court was allowed to "reopen" the period for filing, although no motion to set aside a default entry and/or to vacate a default judgment [Rules 55, 60] were filed. I filed verified motions for: default entry; default judgment; to strike the defendants Rule 6(b) motions and; a response to the Rule 6(b) motions. No answer to the motions was filed. *The district court never ruled on my motion to strike the defendants' Rule 6(b) motions.*

The entry of a default is mandatory. If the clerk fails to, the court should. *Fisher v. Taylor,* 1 F.R.D. 448 (E.D. Tenn.1940). Failure to enter a default doesn't excuse it. *Orange Theat. Corp. v. Rayhertz,* 130 F. 2d 185, 187 (3d Cir. 1942). Rule 6(b) motions may be construed as motions to set aside a default entry. However, their Rule 6(b) motions didn't meet the criteria

to do so. Courts require good faith, a supporting affidavit, a meritorious defense, prompt action, and lack of prejudice to the plaintiff. *Sony Corp v. Elm State*, 800 F. 2d at 320 (2nd Cir. 1986). Murdock *admitted* his default.
" Mr. Murdock would be greatly prejudiced by a default judgment in this case." .App.III, p.102

Judge Cogburn did not consider all the elements necessary to set aside a default. In *S. C. Natl. Bank v. Baker,* 20 F. Rules Service 3d 844 at 846-847 (4th Cir. 1991) [App. V. p.175), the 4th Circuit held that, although Baker had filed an answer only 12 days late, no meritorious defense was alleged, therefore, the default was upheld. Affidavits are essential. *Frost Belt Int.v. Cold Chillin'* , 758 F. S. 131 (S.D. N.Y. 1990]. They must show who is responsible for the default. *Hirtz v. Woma,* 92 F.R.D. 364, 368, 732 F. 2d 178 (3rd Cir.1984).The Respondents. cite *Draper v. Coombs,* 792 F. 2d 915 (9th Cir. 1986) in which the defendants filed a late *answer.* No answer or affidavits were filed in *Langdon v. Swain. See: Carnigan v. U.S.*, 48 F.R.D. 323 (D.Mass.1969)
" ..defendant filed a ..motion to set aside the default and attached to the motion was an affidavit of its general counsel. However, no answer was tendered for filing." *Consolidated Masonry & Fireproofing Co. v. Wagman Const. Co.*, 383 F. 2d 249 at 251 (4th Cir.1967).

My four verified motions for sanctions [App. III, p.129; App. IV, p.141] included a request

for a default in *Langdon v. Swain* because of the bad faith conduct of Swain, Martin and Murdock and the misrepresentations of law and fact in the "Appellees' Brief." [no copy of it is in their appendix]. My complaint [App.III, p. 74] shows their bad faith conduct and liability as does the *Petition* [pgs. 17-19]. The verified accusations are supported by an affidavit and an engineering report[App. III, p.107-112]. No denials of these accusations are in the in the Rsp. B. There was, and, is prejudice to me App.III, p.97] [App. V, p.].T here's no rational explanation for Murdock's default.

" Mr. Murdock mistakenly disposed of Plaintiff's complaint when first received by him, as he believed it was related to an earlier case filed by Plaintiff in state court." [App. III, p.102]

IV. SHOULD JUDGE THORNBURGH HAVE RECUSED HIMSELF ?

I moved to transfer my cases from Asheville (WDNC), to Charlotte (WDNC], because it's much closer. The motion was unopposed, thereby consented to. 28 U.S.C. 1404(b).

The *Petition* states [p.30] that there are numerous factual errors in Judge Thornburgh's dismissal order. The Rsp.B. doesn't deny that those errors exist. Judge Thornburgh acted as an advocate for the Respondents, not a neutral adjudicator. The misconduct of the defendants in *Langdon v. Swain* is

connected to misconduct by T.L. Mallonee, a NCDOT att., whom I believe served under Judge Thornburgh when he was att. gen. Mallonee illegally removed original, pertinent construction records to his office in Asheville, contrary to the N.C. Public Records Law [*Petition*, p..29-30]. *See*: "Supp. Brief."

V. MAY A NON-INFORMA PAUPERIS, NON-PRISONER SUIT BE DISMISSED VIA 28 U.S.C 1915(E)(2), ?

The defendants in *Langdon v. Swain et al.* never filed an answer. The defendants in *Langdon v.Tippett & Cooper* filed an answer but never alleged in their answer that my claims are frivolous or malicious. Therefore, the alleged issue was waived and is not litigated herein by implied consent.

"Appellate courts generally will not consider an issue or theory that was not raised in the district court." *Narey v. Dean*, 32 F. 3d 1521 at 1522 (1th Cir. 1994).

The erroneous dismissal, based on frivolous/ malicious, relied solely upon 28 U.S.C. 1915 (e)(2). The Respondents. now admit in their R.B., p.7., that 28 U.S.C. 1915 (e)(2) is not applicable to my suits, contrary to their arguments in their "Appellees' Brief."

The lower courts didn't dismiss my suits via the court's inherent power, nor were they asked to do so. It is too late to ask the Supreme

Court to do so now. See also: Supp. Brief.

No federal court, except in my two cases, has ever dismissed a fee paid, non-*in forma pauperis*, non-prisoner complaint under 28 U.S.C. 1915(e)(2).

VI. WAS THE ALLEGED DEFENSE OF RES JUDICATA PROPERLY RAISED AND MAY A FEDERAL COURT IGNORE 28 U.S.C 1738?

The defendants in *Langdon v. Swain* have waived their alleged defense of res judicata. They now admit that the defendants in *Langdon v. Swain*, sued in their personal capacities, are not in privity with a state agency.

" Thus it may not have been appropriate for the lower court to dismiss Plaintiff's Complaint in *Langdon v. Swain* on the grounds of *res judicata.*" R.B., page 20.

It is still argued for *Langdon v. Tippett,* although it was not properly raised and supported, thereby waived. The answer in *Langdon v. Tippett*, mentioned *res judicata.* My request to respond to the alleged issue was denied.

" ..trial courts may raise the issue of claim preclusion *sua sponte*.. the parties must have reasonable notice and opportunity to be heard before the application of claim preclusion.." 18 *Moore's Fed. Pract.*, 3d Ed., Sect. 131.5 (2001)

Because the alleged issue of *res judicata* was waived and I was not given an opportunity to respond to it at the district court level, I am not

litigating it by implied consent now. The answer in *Langdon v. Tippett* cited only one alleged state court judgment, *Langdon v. NCDOT* (98-cvs-139, Polk Cnty., N.C.), to support the erroneous argument of *res judicata.* The answer never cited 28 U.S.C. 1738, the Full Faith and Credit Statute, the proper statutory authority. *Dici v. Commonwealth of Penn.,* 91 F. 3d 52 at 542 (3rd Cir. 1996). 28 U.S.C. 1738 requires a certified copy of the record of an alleged prior state judgment pled in *res judicata. See: MGM D. Inn v. Holz,* 41 S.E. 2d 399 at 400 (N.C. App.1991]; *Ferguson v. Harwood,* 11 U.S. 408 (1813); *Moore v. Mabus,* 976 F. 2d 268 at 271 (5th Cir.1992). N.C. law requires the entire record. *T.Mc Innis Assocs. v. Hall,* 349 S.E. 2d 552, 563 (N.C.1986).The Respondents never supplied any documents from any prior case, certified or uncertified to the district court. The answer to *Langdon v. Tippett and Cooper* never cited the N.C. law of res judicata nor did the district court's order of dismissal. Only the federal law of res judicata was applied. The district court's dismissal order never cited, nor applied 28 U.S.C. 1738. The Resp. B. never mentions 28 U.S.C. 1738 and no alleged prior state court documents are attached.

See also: "Supplemental Brief."

VII. MAY THE RESPONDENTS RAISE THE ALLEGED RELEASE AGREEMENT AND QUALIFIED IMMUNITY AS ALLEGED

DEFENSES FOR THE FIRST TIME BEFORE THE SUPREME COURT ?

The Respondents assert, *for the first time*, that the alleged release agreement (R.B. App., p.1a] supports *res judicata* in *Langdon v. Tip-pett.* It was not raised as an alleged defense in the district court, nor with the 4th Cir. It was waived as a defense.

" In the Plaintiff-Appellant's informal brief regarding the second appeal, it is stated on page 27, 3rd line from the top [original format], that the alleged release agreement 'was procured through fraud and without proper consideration...The defendants-appellees never denied these assertions in their brief." "Reply Brief," App. V, pages 194-195.

"..there is no assertion [in the "Appellee's Brief"] that the present claims are barred by the alleged release agreement.." Appendix, Part V, pages 190-191.

Arguments not preserved are deemed abandoned. *N.Y. Life Ins. Co. v. Brown,* 84 F.3d 137, 138 [6-7] (5th Cir. 1996). Qualified immunity was not raised in the lower courts, hence, it was abandoned. *Harlow v. Fitzgerald*, 457 U.S.800, 815 (1982).

VII. DID THE DISTRICT COURT HAVE JURISDICTION TO DISMISS MY CLAIMS FOR THE DEPRIVATION OF MY PROPERTY ?

No. Under N.C.. law, a court lacks jurisdiction to hear a claim for a taking of property unless the noteholders and trustees are enjoined. My request for compensation for the taking [*Langdon v. Swain et al.*] seeks relief under N.C. law and/or federal law. I asked the WDNC to enjoin the noteholders and trustees and the motion was denied [App.I, p. 11-12] [*Pet.for Cert.*, p. 30][*Petition,* p. ii., Quest. 11] The respondents never answered the question.

Likewise, the court in 98-cvs-139 (N.C.) lacked jurisdiction because the noteholders and trustees were not enjoined in that case, therefore, 98-cvs-139 is void and can't support a plea of *res judicata.*

" *Rule 19. Necessary Joinder of Parties.* (a) those who are united in interest *must* be joined " Rule 19, N.C. R. Civ. P.

" ..the trustees and holder of a note on the real property in question were necessary parties.. *N. C. Civil Procedure*, 2nd Ed. , G. Gray Wilson, Michie, Volume I, Section 19-2,p. 379.

" Since persons united in interest are necessary parties, a judgment that determines a claim before proper efforts have been made to join one who is united in interest is **void**." Ibid at page 377. [*See:* Appendix III, p.127].

In 98-cvs-139 (Polk Cnty., N.C.), the N.C. Court of Appeals and the N.C. S. Court refused to address the jurisdictional question.

" If the question of jurisdiction was not litigated in the first action, it can be litigated

in the second.." *Civil Litigation*, Delmar Karlen, The Bobbs-Merril Co., Inc. p.113 (1978)

" ....trial court properly ordered joinder of trustee and noteholder.. Rules Civ. Proc., Rules 19, 21.." *Long v. City of Charlotte*, 293 S.E. 2d 101 at 103 [15] (N.C.1982).

If a party does not move to enjoin a necessary party, the court must do so *ex mero motu. N.C. Civil Procedure, supra,* at 378; *Brooker v. Everhart,* 240 S.E. 2d 360, 365,367 (N.C.1968)

The alleged defense of qualified immunity in *Langdon v. Swain et al.* was waived because it was not raised in the lower courts. *Harlow v. Fitzgerald,* 457 U.S. 800, 815, (1982). I'm not litigating it now by implied consent.

I solemnly affirm, under oath, that everything contained herein is true and correct, except those matters asserted on information and belief, and those matters I believe to be true and correct.

Christopher Langdon,
Petitioner

1835 Edwin Blvd.,Winter Park, Fl. 32789
407-647-7539

Suscribed to and sworn before me, this the 3rd day of ~~September~~ OCTOBER, 2002.

Notary Public

Permanand Bhikha
My Commission DD000669
Expires March 15, 2005